Brief and Argument for Defendants

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 131.

THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Appellant,
vs.
WILLIAM H. TOMPKINS, W. T. LAFOLLETTE and ALEXANDER KIRKPATRICK, constituting the Board of Railroad Commissioners of the State of South Dakota, et al,
Defendants.

It is claimed, in the brief filed by the appellant, that the Circuit Court did not take into consideration the local operating expenses, but a careful review of the case and of the decision of the Circuit Court will disclose the fact that this claim is entirely without foundation. It is also claimed that the Circuit Court stopped in its computation before it had reached the end of the problem which was presented to it for solution. A careful examination of appellant's brief, however, discloses the fact that it is counsel for the appellant that have fallen into this error and not the Circuit Court. One pecul-

iarity about the figures presented by counsel for appellant is, that no matter what the charges may be for local business and the transportation of local freight and passenger business, and no matter what schedule might have been adopted by the Railroad Commission, still the result, if the figures of percentages presented by counsel for appellant are correct, and if the theory of the case presented by them is correct, would come out exactly the same. That is if the local charges made by the appellant Company were four times what they are now, and the figures presented by appellant's counsel and their theory are correct, still the result must necessarily be that the defendants have no right to make reductions because the formula, upon which the calculation depends, would show that the local business was being conducted at a loss, and if the local charges were only half what they are at present, the result of the computatations, made by appellant, would be no different than if they were four times as large, or ten times as large, and the line of reasoning adopted by appellant's counsel, if the same should be adopted by the Court, would apply to any possible rate case that might arise on appellant's lines, for the simple reason that the one fact which is most important of all others as applied to the present case, and of which counsel for appellant have entirely lost sight, is the fact that while the cost of "*conducting transportation*," which enters into the operating expenses, is about two and one-half or three times as large as the cost of "conducting transportation" on other business, that the *actual charges* for the local business are four times what they are on the average of the Company's business; and instead of applying the calculations upon the actual charges made by the Company for conducting local business, they are applied solely upon the averages of all the business of the Company as a whole. This is shown to be true by reference to page 43 of appellant's brief, where they say, "The Court

below said it could not find the actual cost of conducting the local business, but it is certain that the Court could have found that it cost as much as it did to do the business of the system as a whole." This might all be true, and yet it might cost a very much less per cent. of the actual earnings to do such business than it does of the business as a whole, because while the cost of "conducting transportation," which is the only item that is increased in the several items entering into the cost of operation, is increased two and one-half or three times, and the total cost of local operation is increased so that it is not to exceed double at the outside on appellant's own figures of what it is on the business as a whole, the local earnings instead of being twice what they are on the system as a whole, are four times as much for unit of service; thus it will be seen that if it cost sixty per cent. to do the business as a whole, and cost just the same price to do the local business, and if the local business brought in an income of four times that of the business as a whole, that the profits of such business must be enormous, and the percentage of cost on such basis for conducting the local business would be fifteen per cent. of the receipts of such business, and if the cost of such business were three times as much as that of the average of the Company's business, then the cost of such business would be forty-five per cent. of the receipts of such business, leaving still a very large profit, and upon which the reduction made by the Commissioners would still leave a very large margin. It will be observed that the tables presented by counsel for appellant, upon pages 42 to 48, inclusive, also the table on page 55, are all based upon this false assumption, that the receipts for local earnings are the same as the receipts of the average of the Company's business. For instance, they say that it necessarily follows that if the cost of operating expenses on the system as a whole is sixty per cent. of the earnings, then it follows that on account of increased cost of

conducting the local business, that it will cost not less than eighty-five per cent. of the earnings to conduct the local business. This theory assumes as a basis that the charges made by appellant for such local earnings are precisely the same as that of the average of the Company. While as a matter of fact, as shown by the analysis of the testimony in Mr. Null's brief, on page 144, that while the average cost of conducting freight is about one cent per ton per mile, that the receipts from this local freight is 4 66-100 cents per ton per mile, so that there is absolutely no foundation for the contention that the testimony shows that it would cost eighty-five per cent. of this 4 66-100 cents per mile to conduct the local transportation. In fact, the result of the calculations, if based upon the actual receipts for such business, shows that it cost less than fifty per cent. A careful inspection of the argument, appearing on pages 38 and 39 of brief of counsel for appellant, clearly shows that their formula for making calculations throughout is based upon average receipts, and not actual receipts. For instance, again it is shown (page 25 appellant's brief) that the actual local earnings for four years from freight was $471,623.56, now counsel assume that because the cost of conducting the business as a whole amounts to sixty per cent., that it necessarily follows that it will cost sixty per cent. to conduct this business with the additional cost made necessary by the nature of the business on account of its local character. This would be true if the receipts from such business were the same as the receipts for the same service on the system as a whole, but as clearly shown, this is not the case, but, instead of being the same, such receipts are four times that of the business of the system as a whole. The fact that the receipts from the local business or the short haul business are largely in excess of those of the system as a whole will be made perfectly plain by a merely

casual inspection of the Defendants' Exhibit 68, appearing on page 801, by the Defendants' Exhibit 16, appearing on page 175 of the Record, and also from the table of distances, appearing on page 891 of the Record, and instead of the Circuit Court proceeding upon a "*fundamental error of fact*," as said by Judge Amidon in the North Dakota case, it is counsel for appellant and Judge Amidon who were proceeding upon the fundamental error of *assuming* that the receipts for local business were no more for each unit of service than the receipts of the system as a whole. It is conceded that no separate account of local operating expenses are kept, or can be kept, by the Railway Company (page 15 of appellants' brief,) and hence, while it is proper to estimate the additional cost of conducting such business, account must also be taken of the fact that a very large increase of revenue is charged for performing this service. It is claimed by counsel for appellant (page 47 of their brief,) that a reduction of gross earnings amounting to any given per cent. necessarily works a much larger percent-of reduction in the net earnings. They then proceed and prepare another table of percentages to prove this result, but again apply the eighty-five per cent. theory for the purpose of demonstrating that the Circuit Court has allowed them no remuneration for their service. While it is true that a reduction of a per cent. of a gross earning necessarily makes a larger per cent. of reduction upon net earnings, yet it is not fair to make the calculation upon the assumption that the receipts for the local earnings are the same for unit of service as the receipts for average of the business as a whole. The tables on pages 50, 51 and 52 especially are all prepared upon this false assumption, that the average earnings for unit of service of the system as a whole are the amount that is charged for the service on the local business, and hence the results of such tables and such figures amount to nothing, and are merely misleading. For instance, it is

claimed that it cost $114.17 for every $100 earned; by merely adding to the cost of the service the increased cost of operating expenses and taking no account of the increased revenue received for such service this might be true. While if you take account of the increased revenue received from such service, and then apply the percentages claimed by counsel for appellant, it will be found that that the plaintiffs already receive more than $200 for every $100 cost of operating expenses. Again, it is said on page 55 of appellant's brief, "Nothing can be more certain under the testimony than that eighty-five per cent. is a low estimate of local operating expenses in South Dakota, and yet when we come to examine the calculations (pages 38 to 45,) we find that this eighty-five per cent. is based upon the cost of conducting the business as a whole, with added cost of local business, and makes no account of the actual receipts from such business. Again, on page 75, a table is prepared of results if operating expenses are no greater locally than upon the system, leaving out of view entirely the fact that while the local operating expenses are much greater and are conceded to be, still *it does not necessarily follow that they are a greater per cent. of the actual receipts* from such business because the actual receipts are so much greater than the average receipts of the business of the Company as a whole for the same service. This is the vice that pervades the whole of the argument of counsel for appellant.

We do not believe that the Supreme Court can say, from the evidence presented in this Record, that the Circuit Court has erred in fixing the value of the property, which should be designated as property used in conducting the local business, at $10,000,000. It is true that some regard perhaps should be paid to the fact that the property is bonded for a large amount in excess of this valuation, provided that it should be shown that the bonds were given in recent years and were sold upon the

open market, because that might be some test as to the value of the property, but when the bonds were issued years ago, or were issued as refunding bonds taking up prior issues, the fact that the property is bonded for a sum largely in excess of what it would cost to reproduce it, would furnish very little, if any, evidence of the present value of the property, but the question of the cost of the property and the present value of the property has been so thoroughly discussed in the principal brief prepared by Mr. Null, that I deem it unnecessary to go into any extended discussion of that subject, but have thought it proper, owing to the importance of the case, to point out what seems to me to be some of the vital errors in the presentation of this case, as disclosed by the brief of the counsel for the appellant, and believe that a careful inspection of the Record will disclose the fact that this is a vital error into which counsel for appellant have fallen, and one which must necessarily be decisive and conclusive of the question before the Court and necessarily effects the result of the calculations made by counsel for the appellant in their brief, because they have made no calculation whatever and no argument in which this error is absent, hence all assignments of error made on such basis must fail. Railway Commissioners would be of no value whatever so far as fixing maximum rates is concerned, if the theory adopted by counsel for appellant should prevail, because the same result would follow any schedule that might be adopted and under any conditions in any road in which the local business is but a very small per cent. of the entire business of the Company.

We therefore respectfully submit that there was no error committed by the Circuit Court, and that the judgment of the Circuit Court shall be affirmed.

Respectfully submitted,

JOHN L. PYLE,
Attorney General of the State of South Dakota,
and of Counsel for defendants.